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No. 06-1632

In the Supreme Court of the United States

JTEKT CORPORATION FKA KOYO SEIKO COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a party is entitled to have the final results of the Department of Commerce's administrative review of antidumping duties set aside on the basis of an adverse World Trade Organization (WTO) report, where Commerce's final results are indisputably consistent with the governing domestic statute as well as with Commerce's policies at the time the results were issued, and where Congress has specifically provided that WTO reports have no domestic legal effect except as implemented by the Executive Branch or Congress, neither of which has called into question the continuing validity of the final results here at issue.

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OPINIONS BELOW

The judgment without opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter, but is reprinted at 210 Fed. Appx. 992. The opinion of the Court of International Trade (Pet. App. 3a-33a) is reported at 341 F. Supp. 2d 1334.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2006. A petition for rehearing was denied on February 6, 2007 (Pet. App. 50a-51a). On May 7, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 6, 2007, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Antidumping laws provide for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673(1). If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

If the Department of Commerce conducts an antidumping investigation and makes a final determination that merchandise is being sold in the United States at less than its fair value, it is required to determine an "estimated weighted average dumping margin." 19 U.S.C. 1673d(c)(1)(B)(i)(I). The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Once the Department of Commerce finds that dumping has occurred, exporters and producers must then post a cash deposit or security for each future entry in an amount based on their dumping margin. 19 U.S.C. 1673d(c)(1)(B). Before final liquidation of entries sub-

ject to an antidumping duty order, the statute provides that on an annual basis, any interested party may request a retrospective administrative review of the antidumping duty. 19 U.S.C. 1675. The dumping margin that is determined during the course of that retrospective review then becomes the rate at which the entries that occurred during the relevant review period are liquidated, as well as the basis for estimated antidumping duties on new entries. 19 U.S.C. 1675(a)(2)(A) and (C).

The long-standing practice of the Department of Commerce has been to count only positive dumping margins when calculating aggregate dumping margins, a practice known as "zeroing." Under that approach, where normal value does not "exceed[]" the export price, 19 U.S.C. 1677(35)(A), there is no, or zero, "dumping margin," and thus nothing to include when calculating the "aggregate dumping margin" that the statute specifies as the numerator in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B). In other words, "negative" dumping margins for products sold in the United States at a price above the normal value of the goods in the exporting country do not offset an exporter's or producer's dumped sales.

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Trade Agreements (Agreements), one of which is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement)*, *reprinted in* 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453 (H.R. Doc. No. 316). Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.)*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules

regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for resolving disputes concerning the consistency of domestic laws with the Agreements.

As a general matter, Congress emphasized the continuing primacy of domestic law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and domestic law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Agreements nor Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging an Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, only the Agreements' mechanisms may be invoked to resolve disputes as to the United States' compliance with its obligations under the Agreements. See Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include a proceeding before a World Trade Organization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding, Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA), which was expressly "approved" as "authoritative" by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, at 659. Nor may a party ask a court to direct implementation of a WTO report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two procedures by which a WTO report may be implemented in domestic law. The first method, set forth in Section 123 of the

URAA, 19 U.S.C. 3533, establishes a procedure for amending, rescinding, or modifying an agency regulation or practice (within the meaning of United States law) to implement a WTO report concluding that the regulation or practice is inconsistent with the Uruguay Round Trade Agreements, including the Antidumping Agreement. 19 U.S.C. 3511. Section 123(g) specifies that the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures detailed in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and the public must be provided an opportunity to comment, before a determination is made whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(F).

A second procedure for implementing a WTO report in domestic law is set forth in Section 129 of the URAA, 19 U.S.C. 3538. Section 129 is narrower in scope than Section 123(g), and applies when a WTO report indicates that a particular action by the Department of Commerce (or the International Trade Commission) in an antidumping proceeding was not in conformity with the obligations of the United States under the Antidumping Agreement. 19 U.S.C. 3538(b)(1). Like the statutory procedure under Section 123, Section 129 provides for consultation between the USTR and relevant stakeholders before the USTR makes a determination whether, and the Department of Commerce determines how, to implement the WTO report. 19 U.S.C. 3538(b)(3) and (d). Upon completion of that process, the

USTR "*may* * * * direct the [Department of Commerce] to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added). If the USTR requests the Department of Commerce to issue a new determination and orders the Department of Commerce to implement it under Section 129, that new determination applies only prospectively to "unliquidated entries of the subject merchandise" "that are entered or withdrawn from warehouse, for consumption *on or after*" the date the USTR directs the Department of Commerce to implement the new decision. 19 U.S.C. 3538(c)(1) (emphasis added).

In the URAA, Congress made clear that the USTR could, after consultation, choose not to alter the administrative action that is the subject of an adverse WTO report. 19 U.S.C. 3538(b)(4) (the USTR "may" direct implementation of a new determination consistent with a WTO report "in whole or in part"); H.R. Doc. No. 316, at 1015; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation" (emphases added)); 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of a new determination consistent with WTO report "in whole or in part"). Importantly, the political branches could decide not to implement the new determination, but instead compensate the complaining party in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, at 1016.

3. Petitioners are two groups of related Japanese corporations that manufacture, export, and import anti-

friction bearings to the United States, JTEKT Corporation and Koyo Corporation of U.S.A. (collectively Koyo), and NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation (collectively NTN). Pet. ii. In 1989, the Department of Commerce determined that antifriction bearings from Japan (and other countries) were being sold, or likely to be sold, in the United States at less than fair value and issued an antidumping duty order. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (1989). Each year thereafter, Commerce has conducted an administrative review of entries during the preceding year.

On July 7, 2000, Commerce initiated the 11th administrative review of that order, covering the period May 1, 1999, through April 30, 2000. On July 12, 2001, Commerce issued the final results of that administrative review, which are the subject of the present litigation. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Order in Part*, 66 Fed. Reg. 36,551; Pet. App. 34a-48a. In the final results, the Department of Commerce explained that it "continued the practice of using zero where the normal value does not exceed the export price * * * in our calculations of overall [dumping] margins" and rejected the contention that its zeroing methodology should be discarded in light of a WTO Appellate Body report that held zeroing in the context of antidumping investigations to be contrary to the Antidumping Agreement. See *Issues and Decision*

Memorandum for the Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom—May 1, 1999, Through April 30, 2000, 66 ITADOC 36,551, 2001 WL 786882, cmt. 38 (2001).

4. Petitioners brought suit in the Court of International Trade challenging, *inter alia*, the Department of Commerce's methodology for calculating the dumping margin. The Court of International Trade sustained the final results in relevant part in a decision dated August 10, 2004. Pet. App. 3a-33a. Applying settled Federal Circuit precedent, the court held that the Department of Commerce reasonably interpreted the relevant statute to permit zeroing (*i.e.*, the practice of counting only positive dumping margins when calculating an aggregate dumping margin) and rejected petitioners' contention that the Department of Commerce's interpretation was unreasonable because it allegedly conflicted with a report issued by the WTO Appellate Body. Pet. App. 17a, 20a-21a.

5. Koyo (but not NTN) appealed the issue of the Department of Commerce's treatment of nondumped sales.[1] On December 8, 2006, the court of appeals affirmed in a judgment without opinion. Pet. App. 1a-2a.

Subsequent to the court of appeals' judgment, the Department of Commerce issued a determination implementing the WTO Appellate Body report in *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (Apr. 18, 2006) (*US-Zeroing (EC)*), in which the WTO

[1] NTN also appealed, but limited its appeal to other issues not related to the question presented in the petition for certiorari. See NTN C.A. Br. 2.

body concluded that Commerce's policy of not offseting dumped sales with nondumped sales in initial antidumping investigations was inconsistent with the Antidumping Agreement. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (2006) (*Section 123 Investigations Determination*). In its determination implementing the WTO report, the Department of Commerce announced that it will no longer apply its traditional treatment of nondumped sales in pending and future antidumping *investigations*. *Id.* at 77,723. The determination made clear, however, that it does not apply retroactively to completed investigations, *id.* at 77,725, and does not apply to administrative reviews, the kind of determination at issue in this case, *id.* at 77,724.

Additionally, on January 9, 2007, the WTO Appellate Body issued its report in *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (*US-Zeroing (Japan)*), concluding that the Department of Commere's zeroing methodology in administrative reviews was inconsistent with the Antidumping Agreement. See Pet. App. 53a-54a. That WTO proceeding concerned a challenge to the Department of Commerce's treatment of nondumped sales in administrative reviews generally and also a specific challenge to the Department's determination in the 11th administrative review of antifriction bearings from Japan, the review at issue in the present litigation. See *ibid.* Although the United States criticized the report as "devoid of legal merit," it has stated that it intends to comply with its WTO obligations as determined in the dispute. *Id.* at 57a-58a. The United States has not yet stated how it

intends to comply and has not yet taken any action pursuant to either Section 123 or Section 129 of the URAA.

Both Koyo and NTN asked the court of appeals to stay the mandate pending the United States' response to the WTO report in *US-Zeroing (Japan)*. The court denied petitioners' stay request and also denied their petition for rehearing. Pet. App. 50a-51a.

ARGUMENT

Petitioners do not contend that the Department of Commerce's final results are inconsistent with the antidumping statute, or with Commerce's established policies at the time those results were issued, or even with Commerce's presently stated policies regarding administrative reviews. Rather, petitioners argue (Pet. 18) that the final results are in "violation of the United States' treaty obligations," as construed by the WTO. That argument is one that Congress has expressly foreclosed by specifying that no party can challenge agency action "on the ground that such action * * * is inconsistent with" one of the Uruguay Round Trade Agreements. 19 U.S.C. 3512(c)(1)(B). Nor can petitioners circumvent that limitation by urging the Court to vacate and remand a determination that is concededly proper as a matter of domestic law in order for Commerce to conform that determination to an adverse WTO report. Vacating the final results on that ground would give impermissible judicial effect to the WTO body's report in a context where Congress has specified that such decisions have *no* legal effect "unless and until" the political branches have implemented them. 19 U.S.C. 3533(g)(1).

Petitioners' argument (Pet. 20) that vacatur and remand by this Court are essential to protect "the Executive Branch's ability properly to conduct the nation's

foreign affairs and treaty relationships" is nothing short of absurd. The Executive Branch has not requested vacatur or a remand and instead affirmatively opposes such relief. The relief sought by petitioners would thus interfere with, rather than advance, the Executive Branch's "ability properly to conduct the nation's foreign affairs and treaty relationships." Pet. 20.

As petitioners acknowledge (Pet. 15 n.12), essentially the same arguments that they advance in this petition were recently presented in the petition for a writ of certiorari in *Corus Staal BV* v. *United States*, No. 06-1057, which the Court denied on June 25, 2007, see 127 S. Ct. 3001. The same result is warranted here.[2]

1. Petitioners do not dispute that the Department of Commerce's "zeroing" methodology in administrative reviews is consistent with domestic law. That issue was conclusively determined in the government's favor in litigation to which petitioners were parties. See *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004). There, in the context of an administrative review, the court of appeals held that, while the antidumping statute does not compel zeroing, *id.* at 1341-1342, Commerce's "zeroing practice is a reasonable interpretation of the statutory language," *id.* at 1342. The court noted that Commerce's construction "makes practical sense," has been upheld repeatedly by the Court of International Trade (both before and after the URAA), and "combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Id.* at 1342-1343. See also

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[2] Although this brief in opposition refers to "petitioners" in the plural, NTN did not challenge Commerce's zeroing methodology before the court of appeals and has therefore waived the issue. See p. 9 & note 1, *supra*; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Corus Staal BV v. *Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding Commerce's policy of zeroing in initial antidumping investigations), cert. denied, 546 U.S. 1089 (2006).

Although petitioners do not challenge the validity of the final results at the time they were issued, petitioners urge the Court to vacate the final results on the basis of "the treaty violations the WTO has identified" in the intervening time. Pet. 12. That argument, however, is foreclosed by the URAA, which expressly provides that no agency action can be challenged on the ground that it conflicts with the Agreements and that only the political branches, and not the courts, can give effect to an adverse WTO report. See 19 U.S.C. 3512(c)(1)(B) ("No person other than the United States * * * may challenge * * * any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with" the Agreements.); H.R. Doc. No. 316, at 659 (WTO panel and Appellate Body reports "will not have any power to change U.S. law or order such a change"; "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.").[3]

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[3] Petitioners repeatedly refer to the Agreements as a "treaty," see, *e.g.*, Pet. 10, 12, 18, but the agreement creating the WTO and bringing the United States as a signatory to the Antidumping Agreement was not presented to the Senate for its ratification as a formal treaty, pursuant to Article II, Section 2, Clause 2, of the Constitution. Rather, the Agreements were entered into as Executive agreements that were then implemented by Congress in the URAA. Exec. Order No. 13,042, 3 C.F.R. 194 (1998); 19 U.S.C. 3511. As noted in the text, Congress has specifically provided that the Agreements have no independent domestic legal effect.

Petitioners cannot circumvent those strictures by casting their argument in terms of "allow[ing] the Executive Branch to reevaluate its earlier decision, thus minimizing the likelihood that the United States will act contrary to its international obligations." Pet. 16-17. The administrative determination at issue in this case—the final results of the 11th administrative review—is concededly consistent with domestic law. For a court to vacate and remand that legally valid agency determination for reconsideration in light of the WTO body's view of the United States' "international obligations" would thus be to give forbidden judicial effect to those Agreements and WTO reports. As Congress has expressly provided, such WTO reports have no legal effect "unless and until" implemented by the political branches pursuant to the statutory processes specified by Congress. 19 U.S.C. 3533(g)(1); *Corus Staal*, 395 F.3d at 1348-1349. Precisely because the political branches have made no determination to give the WTO reports retrospective effect, there is no basis upon which this Court could vacate the final results in the completed administrative review at issue in this case.

2. In an effort to avoid the statutory prohibitions against challenges based directly on the Agreements or WTO reports, petitioners contend that the Department of Commerce has already signaled its own shift in methodology in response to those reports, and urge (Pet. 12-14) that remand is therefore necessary to allow the agency to decide, in the first instance, whether to apply its own new methodology retroactively. See Pet. 12 (remand required in light of the "change in its governing regulations or policies during the pendency of the appeal" and "specific assurances that [the United States] will implement the WTO's rejection of zeroing in all

cases (including *this specific case*)"); *ibid.* (urging remand "for reconsideration in light of the demise of the zeroing procedure"). Contrary to petitioners' characterization, the Department of Commerce's recent pronouncements do not undermine the propriety of its use of zeroing in the 11th administrative review, which is at issue here. As Commerce has made clear, the changes Commerce has made to its methodology in light of the WTO zeroing reports—reports with which the United States strenuously disagrees—have had prospective effect only and cast no doubt on the validity of already completed reviews and investigations.

a. In support of their assertion (Pet. 16) that the Department of Commerce has "subsequently disapproved" of zeroing, petitioners rely in part upon the Department's notice in the *Section 123 Investigations Determination* that it would implement the WTO report in *US-Zeroing (EC)*, which found Commerce's methodology in antidumping investigations to violate the Antidumping Agreement. Pet. 8-9, 14. But what is significant about that determination is that Commerce specifically limited application of the policy change to future antidumping investigations and those still pending before Commerce on the effective date, February 22, 2007. *Section 123 Investigations Determination*, 71 Fed. Reg. at 77,725. Thus, it is clear that Commerce's *Section 123 Investigations Determination* casts no doubt upon the validity of the final results of the administrative review at issue here, which does not involve an investigation and was not pending before Commerce on February 22, 2007.

Although petitioners contend (Pet. 18) that they are "entitled to a decision by the agency whether th[e] change in policy" regarding initial investigations "ap-

plies to Petitioners' pending [*sic*] 'administrative review,'" Commerce has already made clear that it does not. In May, for example, Commerce rejected a similar argument in connection with an administrative review of the antidumping order with respect to Dutch steel. See *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676 (2007). There, several months after the issuance of the *Section 123 Investigations Determination*, and despite the fact that Commerce had already revoked prospectively the antidumping order regarding Dutch Steel pursuant to Section 129,[4] Commerce nonetheless directed Customs to liquidate entries of Dutch steel during the 4th administrative review period at an antidumping duty rate of 2.52%. *Id.* at 28,677. In its decision memorandum, Commerce made clear that "no change has yet been made with respect to the issue of 'zeroing' in administrative reviews," and that therefore "the Department will continue with its current approach to calculating and assessing anti-dumping duties in this administrative review." *Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* 14 (2007) <http://ia.ita.doc.gov/frn/summary/nether-

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[4] See *Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 25,262 (2007) (revoking the antidumping duty order for Dutch steel, but only "with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after" April 23, 2007).

lands/E7-9815-1.pdf>. Commerce further explained that "the Department considers that the Appellate Body report [in *US-Zeroing (EC)*] represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded" and Commerce therefore "decline[d] to consider giving any broader retrospective effect to the revocation of the order" in the administrative review proceedings. *Ibid.*

b. Petitioners also rely (Pet. 17) on the United States' general statement that it "intends to comply * * * with its WTO obligations" in connection with the report in *US-Zeroing (Japan)*, which found the United States' "zeroing" practice in administrative reviews to violate the Antidumping Agreement. But the United States has not yet implemented that report, and it has given no indication that compliance would affect retroactively the validity of final results, such as those at issue here, that were completed long before the WTO's ruling. In fact, the United States has made clear that it can "comply with its WTO obligations" without setting aside final administrative review determinations, especially when they have been overtaken by a subsequent administrative review.

(i) The presumption against making retroactive changes in light of adverse WTO reports is clear from the URAA itself. In Section 129 of the URAA, 19 U.S.C. 3538, Congress specified that when the political branches choose to respond to a WTO report by issuing a WTO-compliant determination under that Section, the new determination will "apply with respect to unliquidated entries of the subject merchandise * * * that are entered, or withdrawn from warehouse, for consumption *on or after*" the date upon which the USTR directs implementation. 19 U.S.C. 3538(c)(1) (emphasis added).

Because the entries at issue here necessarily predate any as-yet hypothetical Section 129 implementation of *US-Zeroing (Japan)*, such an implementation could have no effect upon this case.

(ii) Likewise, if the political branches choose to implement the report in *US-Zeroing (Japan)* through a more general change in methodology, as provided in Section 123 of the URAA, such a change would not necessarily benefit petitioners with respect to the present administrative review, which was concluded long before the WTO report and any implementing determination. As noted above, the Department of Commerce made clear in its Section 123 implementation of *US-Zeroing (EC)* that a change in methodology pursuant to that Section need not undermine the validity of final agency determinations that predate the modification. See *Section 123 Investigations Determination*, 71 Fed. Reg. at 77,725 (limiting application of change in methodology under Section 123 "to all investigations pending before the Department as of the effective date").

(iii) Petitioners contend (Pet. 12) that the United States "has assured the WTO * * * that the Department of Commerce (and not the courts) will decide whether to reopen completed investigations in light of subsequent rule changes." But Commerce has made no such assurances.

Petitioners rely on a brief filed by the United States before a WTO panel, see Pet. 12, 17 (citing Pet. App. 66a), but petitioners misconstrue the United States' WTO representations by a considerable degree. In the filing cited by petitioners, the United States was responding to a challenge by Canada that United States law violates the WTO "as such," or per se, because it categorically "preclud[es] the Department of Com-

merce" from giving retrospective application of methodological changes "to prior unliquidated entries." Pet. App. 63a (quoting Canadian submission). In response, the United States observed that while Congress has specified that a Section 129 determination has only prospective affect on future entries, that Section "does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding," such as a later administrative review. *Id.* at 64a. Thus, the United States informed the WTO panel, in "any *subsequent* administrative review," *id.* at 66a (emphasis added), *i.e.*, one initiated after the Section 129 determination, "nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review," *ibid.* See also *ibid.* (noting that if, after a Section 129 determination were made, "a company *were then* to request an administrative review," Commerce would decide what effect to give that determination in the context of the subsequently initiated review) (emphasis added). Nothing in the United States' WTO brief suggests that a Section 129 determination could provide a basis for the courts to vacate and remand for further agency action already completed administrative reviews.

(iv) Finally, petitioners are mistaken in their fundamental premise that "[t]he United States cannot fulfill its diplomatic commitments regarding this administrative review" without a remand. Pet. 10. Petitioners assume that in order for the United States to "comply fully with its treaty obligations in light of the WTO's decision in *US-Zeroing (Japan)*, which extends to the administrative review that is the subject of this appeal," *ibid.*, the United States must apply any change in methodology retrospectively to the 11th administrative review.

Petitioners are mistaken. To the extent that the Executive possesses discretion to grant retrospective relief, it has no obligation to do so.

The United States' report to the WTO with respect to its implementation of *US-Zeroing (EC)* reflects the United States' understanding that the Agreements do not require retrospective application of a WTO report to administrative reviews that have been superseded by reviews for subsequent periods. There, the European Communities had brought a general challenge to Commerce's zeroing methodology in initial investigations and specific challenges to particular investigations and administrative reviews. On April 13, 2007, the United States submitted a Status Report detailing its implementation of the adverse WTO report. See App., *infra*, 1a-3a. The United States noted that, as announced in the *Section 123 Investigations Determination*, Commerce would "no longer perform average-to-average comparisons in antidumping investigations without offsets." App., *infra*, 2a. In addition, with respect to the 15 antidumping investigations that had been specifically challenged, Commerce had either revoked the antidumping orders or issued new determinations "us[ing] an average-to-average comparison in which offsets were provided." *Ibid.*

With respect to the challenged *administrative reviews*, however, the United States found that no change was required in order to comply with the WTO report. The Status Report explained that "[w]ith respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring the challenged measures into

compliance with the recommendations and rulings of the" WTO. App., *infra*, 3a.[5]

The 11th administrative review at issue in the present litigation has likewise been superseded by the final results of administrative reviews for subsequent time periods. See, *e.g.*, *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 67 Fed. Reg. 55,780 (2002) (for the period May 1, 2000, through April 30, 2001); *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 Fed. Reg. 40,064 (2006) (for the period May 1, 2004, through April 30, 2005). Thus, as with the European Communities case, in which the United States did not give the WTO report retrospective effect as to superseded reviews, the administrative review at issue here no longer serves as the basis for collecting antidumping duties on new entries.

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[5] The Agreements only contemplate prospective compliance with a WTO report. While compliance would entail, for example, ceasing to collect antidumping duties on new entries after the conclusion of the implementation period based on a dumping margin that was calculated in an impermissible manner, prospective compliance does not, in the United States' view, preclude continued liquidation of entries that occurred prior to the conclusion of the implementation period. The focus on the date of entry rather than date of liquidation reduces any inconsistency among countries in the effect of WTO reports depending upon such technicalities as whether a country utilizes a liquidate-and-refund method, in which duties are liquidated at the time of entry subject to possible refund if challenged, or, as in the United States, a deposit-and-liquidate approach, under which duties are conditionally deposited at the time of entry subject to liquidation after any challenge is concluded.

3. Neither the changes in methodology that Commerce has made in response to the *US-Zeroing (EC)* report, nor the as-yet-unimplemented WTO report in *US-Zeroing (Japan)*, undermines the validity of the final results at issue in this case. Thus, there is no basis for this Court to remand in order to permit Commerce to decide "whether to implement the WTO's rejection of zeroing in this administrative review as it had in pending and future investigations." Pet. 15. Because there has been no change in policy with respect to administrative reviews, the principle cited by petitioners—that a court should remand following an agency's change in policy to permit the agency to determine in the first instance the extent to which the policy change should be applied retroactively—is simply inapposite. Pet. 12-14 (citing *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974); *Panhandle E. Pipe Line Co.* v. *FERC*, 890 F.2d 435, 438-449 (D.C. Cir. 1989); *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999); *National Fuel Gas Supply Corp.* v. *FERC*, 899 F.2d 1244, 1249-1250 (D.C. Cir. 1990)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2007

APPENDIX

World Trade Organization

WT/DS294/20/Add.2
13 April 2007
(07-1493)

Original: English

UNITED STATES—LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Status Report by the United States

Addendum

The following communication, dated 12 April 2007, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.6 of the DSU.

Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294)

The United States submits this report in accordance with Article 21.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

On 9 May 2006, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in *United States—Laws, Regulations and Methodology for Calcu-*

lating Dumping Margins ("*Zeroing*") (DS294). At the following DSB meeting on 30 May 2006, the United States informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. On 28 July 2006, the United States and the European Communities agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on 9 April 2007.

On 6 March 2006, the US Department of Commerce ("Commerce") published a notice requesting comments on its intention to no longer perform average-to-average comparisons in antidumping investigations without offsets. On 26 January 2007, Commerce published a notice that the date after which it would no longer perform such comparisons would be 22 February 2007. Accordingly, as of 22 February 2007, the United States is no longer performing average-to-average comparisons in antidumping investigations without offsets.

With respect to the 15 anti-dumping investigations at issue in this dispute, three had already been revoked. These are: Certain Cut-to-Length Carbon-Quality Steel Plate from France (revoked 7 December 2005), Certain Stainless Steel Sheet and Strip in Coils from France (revoked 4 August 2005), and Certain Stainless Steel Sheet and Strip in Coils from the United Kingdom (revoked 4 August 2005). With respect to the remaining 12, on 9 April 2007, Commerce issued 11 determinations. In those determinations, Commerce used an average-to-average comparison in which offsets were provided. As a result, in two of these determinations, Commerce found no dumping. These are: Certain Hot-Rolled Steel from the Netherlands and Stainless Steel Wire Rod from

Sweden. The margins for the others were adjusted accordingly, and in several cases, Commerce found no dumping by individual companies. With respect to the 15th investigation, the respondent has alleged a clerical error in the original investigation, and Commerce is investigating the allegation further.

With respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring the challenged measures into compliance with the recommendations and rulings of the DSB.